SUPREME COURT, U. S.
FEB 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973

**No. 73-1081**

THE LONG ISLAND COLLEGE HOSPITAL,
*Petitioner,*

*against*

NEW YORK STATE LABOR RELATIONS BOARD,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO,
*Respondents.*

## BOARD'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## BOARD'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent, New York State Labor Relations Board (herein called the Board), submits this brief in opposition to the petition for a writ of certiorari to the Court of Appeals of the State of New York filed by The Long Island College Hospital (herein called the Hospital).

The Board contends that:

1. The Hospital has failed to comply with this Court Rule 23 (1) (f).
2. No *substantial* constitutional issue either was raised in the New York Court of Appeals or is now tendered to this Court for disposition.
3. The Board did not deny the Hospital equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution in finding that the Hospital's skilled maintenance employees constitute an appropriate bargaining unit.
4. The Board did not deny the Hospital procedural due process of law in contravention of the Fourteenth Amendment to the United States Constitution in connection with the Board's confidential file in the representation proceeding.

## Counter-Statement of the Case

The Hospital's purported "Statement of the Case" at pp. 4-11 of its petition[1] is so replete with irrelevancies, equivocations, innuendoes, distortions, half-truths, and outright misstatements of the record and the findings below,[2] that unfortunately it becomes necessary for the Board to set forth this Counter-Statement of the Case setting forth the facts needed for this Court's consideration of the only

1. "H. Ptn. p. —" refers to pages in the Hospital's petition for a writ of certiorari docketed with the Clerk of this Court on January 9, 1974. References to the Appendix thereto have the suffix "—a".

2. See this Court's Rule 23 (4).

issues raised upon this petition. It is neither necessary, nor would it be helpful to this Court, to attempt to enumerate, clarify or rectify all of these, although a few of the more glaring examples will be noted in passing. Most of the instances involve the Hospital's efforts to reargue the contentions it had made below upon purely state issues which already have been decided adversely to it by the Board and the State Courts, and are not now before this Court for further review.

This matter has been in litigation for almost 11 years. It began as a representation proceeding before the Board on July 1, 1963, the day the Board acquired jurisdiction over non-profitmaking hospitals by N. Y. Laws of 1963, ch. 515. Even before that date, the Board had conducted a general public hearing on June 13, 1963, concerning the problems involving appropriate bargaining units at hospitals; written and oral opinions of both employers and unions in the field were received. During 1963 and 1964, in several representation proceedings, including this one, the Board conducted lengthy hearings at which the parties were afforded an opportunity to adduce evidence relating to these unit issues and to make a full record. The Board also considered memoranda from the various parties.

Following a thorough consideration of all of the foregoing, the Board concluded that generally there should be 5 basic units in the hospital industry, namely: (1) service and maintenance, (2) technical, (3) office-clerical, (4) registered professional nurses, and (5) licensed practical nurses. The Board further recognized that special problems are presented concerning skilled maintenance em-

ployees. For reasons fully set forth in its decision in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), quoted in Appendix A hereof, the Board concluded that skilled maintenance employees in hospitals should be afforded an opportunity to bargain in a separate unit if they wish to do so. The Board has followed that practice consistently since 1964. (See, for example, the cases cited in the Appendix of the Hospital's petition, p. 28a, footnote 2).

The Board thereupon conducted a self-determination election among the Hospital's skilled maintenance employees who voted: (1) to bargain in a separate unit limited to skilled maintenance employees,[3] and (2) to be represented for the purposes of collective bargaining by Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, AFL-CIO, herein called the Union.[4]

The Hospital filed objections to the election upon which the Board conducted an informal investigation, and con-

3. The statement on p. 6 of the Hospital's petition that "* * * a majority of the maintenance employees voting in the election did not 'signify a desire to bargain separately', * * *" is an outright falsehood. The Court of Appeals in sustaining the Board, held: "* * * the valid votes were 21 'yes' to 5 'no' * * *" (H. Ptn. p. 10a). See the extensive discussions of this point below in the Appendix to the Hospital's petition, pp. 65a-67a (Trial Examiner's Intermediate Report), 38a-39a (Board's Decision and Order), 20a (Appellate Division's Opinion), 22a (Dissenting Opinion at Appellate Division), and 10a-11a (Court of Appeals' Opinion). Moreover, this misstatement is in no way relevant to, or a basis for, the petition for a writ of certiorari now before this Court.

4. Similarly false is the related statement on pp. 6 and 14 of the Hospital's petition that the Union was selected as bargaining representative by "a one vote margin." The Union won by 4 votes. (See discussion of this matter below in the Appendix to the Hospital's petition, pp. 51a-52a (Trial Examiner's Intermediate Report), 39a (Board's Decision and Order), 20a-21a (Appellate Division's Opinion), 22a (Dissenting Opinion at Appellate Division), and 10a-11a (Court of Appeals' Opinion).)

cluded either: (1) that the objections were insufficient on their face, or (2) that there was insufficient *prima facie* evidence to warrant a hearing.[5] The Board overruled the objections and issued its formal certification of representatives on December 28, 1964.

Years of litigation ensued over procedural matters not at issue upon this petition. See *The Long Island College Hospital* v. *Catherwood,* 23 N Y 2d 20 (1968), appeal dismissed, 394 U.S. 716 (1969). The Union thereafter filed an unfair labor practice charge alleging the Hospital's refusal to bargain with the Board. The Board issued its complaint, held hearings, and eventually issued its bargaining order (H. Ptn. Appendix pp. 26a-80a). During this hearing, the Board afforded the Hospital an opportunity to adduce evidence in support of its election objections which the Board had earlier overruled following its informal investigation.[6]

The Hospital thereupon instituted in the Appellate Division of the Supreme Court of the State of New York, Second Department, a judicial review of the proceedings before the Board. The Board cross-petitioned for enforcement of its bargaining order. For reasons not here material, the Appellate Division (one Justice dissenting) annulled the Board's order, denied the Board's cross-petition for enforcement thereof, and directed that a new election be conducted among these employees (H. Ptn. pp. 20a-25a).

5. No formal hearing is required upon election objections unless a factual issue is raised which, if true, would warrant setting aside the election. *Polymers, Inc.* v. *N.L.R.B.,* 414 F. 2d 999 (1969), cert. den. 396 U.S. 1010.

6 This was not the usual "unfair labor practice" hearing, the refusal to bargain being conceded, but essentially a hearing upon the Hospital's election objections, a constituent part of the representation proceeding. (See H. Ptn. pp. 7-8, 12; see also p. 97a.)

All parties appealed to the Court of Appeals, the State's highest court. In an Opinion by Chief Judge Stanley H. Fuld, speaking for an unanimous bench, the Court fully sustained the findings of the Board and enforced its bargaining order in its entirety (32 N Y 2d at 314; H. Ptn. pp. 1a-19a). The Court of Appeals thereafter denied the Hospital's motion for reargument (H. Ptn. p. 81a). It also granted the Hospital's motion to amend the remittitur to recite that the Court had considered and passed upon questions under the Constitution of the United States and held that there was no violation thereof (H. Ptn. pp. 82a-83a).

## POINT I

**The petition for a writ of certiorari is defective on its face for failure to comply with Rule 23 (1) (f).**

This Court's Rule 23 (1) (f) requires that the petition specify certain details as to the time, place, and manner in which "the federal questions sought to be reviewed were raised."

The "Statement of the Case" at pp. 4-11 of the Hospital's petition nowhere complies with the requirements of this rule. The general, self-serving statement in the 4th paragraph of p. 10 is insufficient.

Moreover, the excerpts from the transcript of the hearing before the Board quoted at pp. 84a-97a of the Hospital's petition do not reveal that any questions under the Fourteenth Amendment of the United States Constitution

were raised before the Board. Section 707 (2) of the New York State Labor Relations Act, providing for judicial review of final orders of the Board, specifically states "no objection that has not been urged before the board, its member, agent or agency, shall be considered by the court * * *" (30 McKinney's Consolidated Laws of New York (Labor Law, §707 (2)). In New York State, this includes constitutional issues. *Stork Restaurant, Inc.* v. *Boland,* 282 N.Y. 256, 266 (1940).

Accordingly, the Hospital has failed to establish that it properly raised any constitutional issues in the proceeding before the Board, or preserved them for review by this Court.

## POINT II

**No substantial constitutional issue was presented to, or argued before, the New York Court of Appeals.**

The Hospital had filed two briefs in the Court of Appeals: (1) its main brief upon its own cross-appeal; and (2) its answering brief to the Board's brief. In each of these it set forth both its "argument" and the "questions involved." These are reproduced in the Appendices hereto: excerpts from the Hospital's main brief in Appendix B, and excerpts from the Hospital's answering brief in Appendix C.

A reading of these clearly demonstrates that the constitutional issues sought to be reviewed by this petition were not presented to, or argued before, the Court of Appeals. The Fourteenth Amendment was never mentioned as an issue which the Hospital was tendering to the

Court of Appeals for determination or as a ground for reversing the Board's bargaining order.

The few references to the Fourteenth Amendment scattered in the body of the Hospital's briefs below were merely tossed in "for whatever they were worth," and did not serve to present for serious consideration by the Court of Appeals any real or substantial issues under the United States Constitution which are now worthy of, or ripe for, consideration by this Court. The Hospital's own casual and cavalier treatment of any constitutional issue below demonstrates that it was not seriously pressing such grounds as a viable basis for attacking the Board's bargaining order.

## POINT III

### The Board did not deny the Hospital "equal protection of the laws" in finding appropriate a unit of skilled maintenance employees.

#### A. The Law

There is no constitutional requirement that labor relations boards find exactly the same appropriate bargaining unit at every establishment even within the same industry, much less in different industries. None of the cases cited at pp. 20-22 of the Hospital's petition supports any such assertion.[7]

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7. The sole labor relations case cited, *Council 19, AFSCME* v. *N.L.R.B.*, 296 F. Supp. 1100 (N.D. Ill., 1968), at p. 21 of the Hospital's petition—a district court decision hardly controlling upon this Court—did not involve appropriate bargaining units, the issue upon which certiorari is sought here. It was an attempted declination of jurisdiction by the National Board contrary to the express provisions of the statute. (29 U.S.C. §152 (2).) No appeal was taken from the District Court's holding. (296 F. Supp. at p. 1106.)

A long line of decisions of this Court has settled that labor relations boards, in the exercise of their expert judgment, are vested with a broad discretion in establishing collective bargaining units. See, for example, *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 152-153 (1941); *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 134 (1944); *Packard Motor Co.* v. *N.L.R.B.*, 330 U.S. 486, 491 (1947); *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422 (1947). Judicial review of unit findings is narrowly circumscribed, the test being whether the Board was arbitrary and capricious. *May Department Stores* v. *N.L.R.B.*, 326 U.S. 376, 380 (1945); *Packard Motor Co.* v. *N.L.R.B.*, 330 U.S. 486, 491 (1947). That is what the New York Court of Appeals held in sustaining the Board's unit finding here (H. Ptn. pp. 3a-7a).

The Hospital's contention, if accepted, would virtually put an end to the work of labor relations boards in connection with appropriate bargaining units. According to the Hospital, once a certain unit is found at a single establishment, exactly the same unit must thereafter be found at every other establishment not only in the same industry but in all possibly related fields. This freezing of bargaining units into an inflexible, rigid mold would stultify administration of the labor relations acts not only in New York State, but in several other states as well as at the National Labor Relations Board.

This Court has never held, and should not now hold, that identical bargaining units must be found appropriate

in every situation.[8] Thus, no question is presented under the Fourteenth Amendment to the United States Constitution by virtue of the Board's unit finding.

**B. The Facts**

The Hospital has sought to convey an entire inaccurate picture of the Board's practice in finding appropriate bargaining units of skilled[9] maintenance employees at hospitals. The Hospital suggests at p. 5 of its petition that The Long Island College Hospital is the only one at which the Board has found appropriate a unit of skilled maintenance employees.[10] (See also pp. 3, 17). That is untrue.

8. It is fascinating to compare *The Society of The New York Hospital*, 34 NYSLRB 486, 488-498, 508-513 (1971), represented by the same attorneys as The Long Island College Hospital. The New York Hospital is making virtually the same contentions as are urged upon this petition and, at the same time, strenuously objecting to the appropriateness of a unit of skilled maintenance employees, the same as that found by the Board at numerous other non-profit-making hospitals. The New York Hospital insists that a *different* unit must be found at *that* hospital. Indeed, it has persuaded the Appellate Division of the Supreme Court, First Judicial Department, to remand that proceeding to the Board for still further hearings on the unit issue. *The Society of The New York Hospital* v. *N.Y.S.L.R.B.*, 40 (N.Y.) A D 2d 603 (1972), appeal pending in the Court of Appeals. One cannot help but wonder whether these hospitals are seriously litigating genuine legal and constitutional issues, or merely playing tiddly winks!

9. The Hospital incorrectly describes the employees here involved as "unskilled" (H. Ptn. p. 5). That is not the state of the record before this Court. The Board found that these are "skilled" maintenance employees (H. Ptn. pp. 27a-28a; *The Long Island College Hospital*, 27 NYSLRB 405, 410-411 (1964)) and both the Appellate Division (H.Ptn. p. 20a) and the Court of Appeals (H. Ptn. pp. 3a, 5a-7a) have affirmed that finding. Certiorari is not sought therefrom (H. Ptn. p. 3). Indeed, at p. 10 of the Hospital's petition, it acknowledges that these are "skilled" maintenance employees!

10. *Lawrence Hospital*, 28 NYSLRB 552 (1965), relied upon by the Hospital at p. 5 of its petition, has no application to the issue now before this Court. There the Board did not refuse to find that "skilled" mainenance employees constitute an appropriate bargaining unit. Rather, the finding was that this small hospital did not employ any "skilled" maintenance employees, only handymen.

In a long line of cases commencing with *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), the Board has consistently found appropriate bargaining units of skilled maintenance employees at hospitals. Some examples are set forth in footnote 2 of the Board's Decision and Order herein, on p. 28a of the Appendix to the Hospital's petition. The Board continues to find such units appropriate. Indeed, this practice has been accepted by virtually the entire hospital industry in New York State, except for this Hospital and one or two others. Significantly, many such elections have been conducted by the Board upon consent of the parties.

### *1. Private, Profitmaking Hospitals*

Wholly misleading and equivocal is the statement on p. 17 of the Hospital's petition that the Board "has never found" appropriate a unit of skilled maintenance employees at private, profitmaking hospitals. The correct statement would be that the Board "has never *refused* to find" appropriate such a unit. The simple fact is that during the period of time this Board had jurisdiction over private, profitmaking hospitals,[11] no petition had ever been filed with the Board seeking a unit limited to skilled maintenance employees.[12] That is true of all the cases cited on p. 17 of the Hospital's petition.

11. The National Labor Relations Board, reversing its prior practice, asserted jurisdiction over private, profitmaking hospitals in 1967: *Butte Medical Properties (Medical Center Hospital)*, 168 NLRB 266.

12. The Board does not find that skilled maintenance employees constitute an appropriate bargaining unit at hospitals unless: (1) a petition is filed seeking such a unit, and (2) the employees vote in a self-determiniation election to bargain as a separate unit. See the Board's decision in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964) quoted in Appendix A hereof, below.

The repeated statement at pp. 3, 5, 17, 20-22 of the Hospital's petition that the Board applies "different standards" to its unit determinations in private, profitmaking hospitals and in non-profitmaking hospitals is simply untrue. To the contrary, over the years the Board has treated the two types of hospitals interchangeably, frequently citing decisions in one type as a basis for its finding in the other. It has done so, for example, as to the following types of units: service and maintenance,[13] registered professional nurses,[14] and licensed practical nurses.[15] As stated earlier, the only reason it had not heretofore found a separate unit of skilled maintenance employees at private, profitmaking hospitals is that since its 1964 decision in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), no petition has been filed with this Board seeking that unit. If such a petition were filed, undoubtedly it would be dealt with in the same manner the Board has handled similar petitions at non-profitmaking hospitals.

Clearly, then, there is no basis for the Hospital's wholly unfounded contention that the Board has found appropriate a unit in this case different from what it would find at a private, profitmaking hospital.

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13. Compare *Hayes Seventy-Third Corp. (Physicians Hospital),* 26 NYSLRB 428, 430-431 (1963) (private, profitmaking hospital), with *House of the Holy Comforter,* 26 NYSLRB 437, 440 (1963), (non-profitmaking hospital).

14. Compare *Westchester Square Hospital,* 25 NYSLRB 532, 535-538 (1962) (profitmaking hospital), with *St. Luke's Memorial Hospital Center,* 30 NYSLRB 234 (1967) (non-profitmaking hospital).

15. Compare *Westchester Square Hospital,* 29 NYSLRB 325 (1966), and *Winkler Enterprises, Inc.,* 27 NYSLRB 121, 129 (1964) (profitmaking hospital and nursing home), with *Wyckoff Heights Hospital,* 30 NYSLRB 254, 257 (1967) (non-profitmaking hospital).

### 2. *Educational Institutions*

Even falser is the statement on p. 17 of the Hospital's petition that the Board "has never found" appropriate a unit of skilled maintenance employees at educational institutions. That the Hospital knows full well this statement is not true is shown by its addition of the word "contested" (H. Ptn. pp. 5, 17).

The Board has certified units of skilled maintenance employees at educational institutions,[16] and has applied the same standards as at hospitals.[17] Similarly, the National Labor Relations Board also finds appropriate units of skilled maintenance employees at educational institutions.[18]

The statement at pp. 3, 5, 17, 20-22 of the Hospital's petition that the Board applies "different standards" to non-profitmaking hospitals and to educational institutions is entirely without foundation. Indeed, the overall policy consideration of avoiding undue "compartmentalization" at educational institutions, as quoted on p. 19 of the Hospital's petition from the Board's decision in *New York University*, 32 NYSLRB 425, 430 (1969) is a policy earlier enunciated in cases involving non-profitmaking hospitals! See, for example, *St. John's Queens Hospital*, 26 NYSLRB 529, 532 (1963), which was itself quoted in the Board's *New York University* decision.

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16. See, for example, *Cornell University*, 32 NYSLRB 202, 203 (1969); *C. W. Post College*, 33 NYSLRB 274 (1970).

17. Compare *LeMoyne College*, 33 NYSLRB 270 (1970), with *Lawrence Hospital*, 28 NYSLRB 552, 554 (1965).

18. See, for example, *Duke University*, 200 NLRB No. 13, 81 LRRM 1488 (1972); *Cornell University*, 183 NLRB No. 41, 74 LRRM 1269 (1970).

Once again, the cases cited and quoted from at pp. 18-19 of the Hospital's petition did not involve petitions seeking a unit of skilled maintenance employees. Indeed, at *New York University,* 32 NYSLRB 425 (1969), quoted from at p. 19, a separate unit of skilled maintenance employees has been in existence since at least 1939.[19]

**C. Conclusion**

The Hospital's repeated statement (H. Ptn. pp. 3, 5, 20-22) that there is no "rational basis" for the unit the Board has found here is entirely baseless. The Board fully set forth its reason for establishing separate units of skilled maintenance employees under appropriate circumstances in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), quoted in Appendix A hereof, below.

The Hospital concedes at pp. 20-22 of its petition that when a rational basis does exist for any distinctions which happen to be made (and there are no such distinctions here), then there is no violation of "equal protection" rights under the Fourteenth Amendment to the United States Constitution.

It is clear from the foregoing that no reason exists for granting certiorari on this issue as requested at p. 3 of the Hospital's petition.

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19. See *University Hospital,* 30 NYSLRB 259, 265 (1967).

## POINT IV

**The Hospital was not denied "procedural due process of law" in relation to the Board's confidential file in the representation proceeding.**

There is no merit to the Hospital's contentions either: (1) that it had a constitutional right to conduct a "fishing expedition" through the Board's confidential file in the representation proceeding during the hearing upon the Hospital's election objections; or (2) that the Trial Examiner used "secret" information from that file when making recommended findings in his Intermediate Report.

### A. Examination of the File

One of the few correct statements in the Hospital's petition is that the Board would not permit the Hospital to have possession of or to examine the Board's confidential file in the representation proceeding (H. Ptn. pp. 3, 8, 11, 12, 14). That file was not made available to the Union either (see excerpt from the minutes of hearing set forth in Appendix D hereof, below). Nor was it in the possession of the Trial Examiner (see sub-section "B," below). Throughout the hearing, the Board's litigation attorney[20] con-

20. The Hospital's continual reference to the Board's litigation attorney as a "prosecutor" is both inaccurate and an obvious effort to arouse prejudice (H. Ptn. pp. 3, 8, 11-13). This was not a criminal prosecution. It was a quasi-legislative and quasi-judicial investigation under a remedial statute. Indeed, since the hearing was primarily upon the Hospital's own objections to the election (footnote 6, above), the Hospital had the burden of proof on those issues and was, if there is any analogy, the "prosecutor" in this matter. *N.L.R.B.* v. *Monroe Auto Equipment Company*, 470 F. 2d 1329, 1333 (1972).

trolled that file (H. Ptn. pp. 3, 8, 11, 12, 14; Appendix pp. 84a-97a; Appendix D hereof, below).

The reason that the Board's litigation attorney was going through the Board's confidential file in the representation proceeding was to locate, for the purpose of marking in evidence, various formal documents in the representation proceeding; the Hospital already had copies of these. This appears clearly from the excerpts of the minutes of hearing set forth in the Appendix to the Hospital's petition, at pp. 84a-89a. See also Appendix D hereof, below. These documents included, for example, the Board's Decision and Direction of Election, the notices of election,[21] the sample ballots, the official ballots, the reports of count, the election objections filed by both parties, the Board's orders overruling all the objections, the certification of representatives, etc. These related to matters about which there was no factual or testimonial dispute. Those issues concerning which there was a factual dispute were developed by means of oral testimony or documentation from other sources, much of which was in possession of the Hospital itself. The Hospital was in fact furnished all material and relevant documents it requested (H. Ptn. pp. 85a, 87a-88a; Appendix D hereof, below).

The Hospital had no right, constitutional or otherwise, to conduct a "fishing expedition" through the Board's confidential file. The cases cited at pp. 13-14 of its petition

21. This was the document being sought at the time the file was given to the Board's Labor Elections Supervisor while he was on the witness stand. (See H. Ptn. pp. 88a-89a.) The Hospital's assertion at pp. 8, 12 and 14 of its petition that the Labor Elections Supervisor improperly examined the file is wholly irrelevant to this application; it is not one of the grounds upon which a writ of certiorari is sought. (See H. Ptn. p. 3.)

do not support any such claim. To the contrary, this Court has expressly held otherwise. In *Gordon* v. *U.S.*, 344 U.S. 414, 419 (1953), the Court upheld a demand for the production of certain identified documents because it "* * * did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." Accord, *Jencks* v. *U. S.*, 353 U.S. 657, 677 (1957).

The Hospital had only the right, which it exercised, to inquire whether specific documents were in the Board file and, if material and relevant, demand their production. *Jencks* v. *U. S.*, 353 U.S. 657, 659, 665-668 (1957). The Trial Examiner put the matter succinctly when, in denying the Hospital's request to examine "the entire file" he stated: "No, no more than Mr. Alfieri [the Board's litigation attorney] or Mrs. Vladeck [the Union's attorney] would have the right to go through your attache case—" (H. Ptn. pp. 85a-86a).

**B. Use of the File**

There is nothing in the record before this Court to substantiate the Hospital's unfounded and gratuitous assertions either that: (1) the Trial Examiner had possession of the Board's confidential file in the representation proceeding during the hearing on the election objections; or (2) that he used it as a basis for the recommended findings in his Intermediate Report (H. Ptn. pp. 3, 8, 11-16).

The excerpts from the transcript of the proceedings before the Board quoted at pp. 84a-97a of the Appendix to the Hospital's petition, and in Appendix D hereof, below, show clearly that the file was in the possession of the litiga-

tion attorney, not the Trial Examiner. An examination of the entire transcript shows that this was the case.

The Trial Examiner's Intermediate Report (H. Ptn. pp. 48a-80a) itself reveals that his recommended findings were based solely upon the evidence contained in the transcript of the formal record, and not upon any information culled from the Board's confidential file.[22] The Hospital has not pointed to a single recommended finding that is alleged to have been based upon material outside the formal record. Thus, there is no basis whatsoever for the Hospital's statement that the Trial Examiner's recommendations were based on information that is not a part of the "record" (H. Ptn. p. 8), or that he acted upon "secret" information (H. Ptn. pp. 3, 11, 12, 14).

Accordingly, the cases relied upon by the Hospital at pp. 14-16 of its petition have no relevancy to the issue now before this Court. To the extent that they are even remotely related, they all involved instances in which it clearly appeared from the record that the agency involved had in fact acted upon information that was not a part of the formal record of the proceeding. They did not involve a totally unsupported allegation that this might have occurred.[23]

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22. The case was not "decided" by the Trial Examiner, as erroneously stated at pp. 3 and 8 of the Hospital's petition. The Trial Examiner only "recommended" findings to the Board (H. Ptn. pp. 27a and 49a). The actual findings were made by the Board itself (H. Ptn. pp. 27a and 43a).

23. In *Garner* v. *Louisiana,* 368 U. S. 157, 173 (1961), relied upon at p. 15 of the Hospital's petition, it was the State while seeking to uphold a conviction, not the accused, that sought to have this Court find that the trial judge had taken "judicial notice" of certain information. Rejecting this contention, the Court said: "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything." That is the situation here.

### C. Conclusion

It is clear from the foregoing that no substantial issue under the "due process clause of the Fourteenth Amendment to the United States Constitution is presented by this record which warrants the granting of a writ of certiorari as requested at p. 3 of the Hospital's petition.

## Conclusion

**The petition for a writ of certiorari should be denied.**

No genuine constitutional issue is raised by the twisted, distorted, convoluted and non-existent "facts" concocted by the Hospital in its petition. It has simply set up its own straw men to attack. It has not accurately represented to this Court the record and the findings below, which findings are not here reviewable.

Moreover, the Hospital has not cited a single controlling decision of this Court establishing that what actually occurred here in any way violated its rights under the Fourteenth Amendment to the United States Constitution. Merely "crying wolf" does not suffice to raise a substantial constitutional issue.

Manifestly the sole purpose of this petition is to perpetuate the long delay in fulfilling the Hospital's obligation to bargain collectively with the chosen representative of its skilled maintenance employees. Commencing with its initial attack upon the constitutionality of the "hospital" amendments to the New York State Labor Relations Act in

1963 and the jurisdiction of the Board, upon grounds different from those now before the Court,[24] the Hospital has opposed, disputed and litigated every action of, and finding by, the Board throughout this entire proceeding and over the past 11 years. Clearly the Hospital's primary purpose is to engage in litigation of every conceivable issue before every possible tribunal, regardless of the merits of its contentions either factually or legally.

These employees and their Union have been waiting since 1964 for effectuation of their collective bargaining rights under the New York State Labor Relations Act. They must not be required to wait still longer. Enough is enough!

Respectfully submitted,

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24. *The Long Island College Hospital*, 27 NYSLRB 405, 406-407 (1964).

# APPENDICES

# APPENDIX A

## Excerpts from the Board's Decision in Wyckoff Heights Hospital, 27 SLRB 80-83

### V. The Appropriate Unit

Local 144 and the Employer agree, in substance, that the appropriate unit should consist of the service and maintenance employees[17] (excluding administrators, supervisors, professionals, registered nurses, licensed practical nurses, pharmacists, office, clerical,[18] and technical employees). They disagree, however, as to certain miscellaneous positions, to be discussed below.

Maintenance Division seeks a unit limited to the employees of the engineer-maintenance department of the hospital.

This is the first decision in the series of hospital cases issued by us, since the amendment of our Act to include voluntary hospitals in which a separate unit of maintenance employees has been sought.

*The Engineer-Maintenance Employees*

The Employer's engineer-maintenance department is under the supervision of the chief engineer. There are also

17. Local 144 originally contended that the unit should also include office, clerical, and technical employees. By letter dated October 4, 1963, and received by the Board on October 7, 1963, Local 144 amended this position. It now agrees to a unit of service and maintenance employees in this, as well as all other pending proceedings in which it had taken a contrary position at the hearing. This conforms to the Board's recent holdings on this issue. (*Hayes Seventy-Third Corp. (Physicians Hospital)*, 26 SLRB 428, 430-431; *House of the Holy Comforter*, 26 SLRB 437, 438-440; *Flushing Hospital and Dispensary*, 26 SLRB 445, 446-447; *Yasuna, et al. (Mount Eden General Hospital)*, 26 SLRB 466, 468-469, and cases there cited.)

18. The receiving clerk and helper in the store's receiving department is essentially a stock clerk and, as such, is included in the unit. (*St. Clare's Hospital*, 26 SLRB 504, 505; *St. John's Queens Hospital*, 26 SLRB 529, 531).

an assistant to the chief engineer,[19] electricians, helpers, mechanics, painters, plumbers, plasterers, carpenters, masons, maintenance men, laborers, handymen, watch engineers, boiler room attendants, and stock clerk.[20]

In support of its unit contention, Maintenance Division argues that the engineer-maintenance department employees are a homogeneous group of skilled craftsmen[21] who have maintained their separate identity and thus may constitute a separate bargaining unit. There is no interchange of employees between this department and any other department in the hospital.[22]

As their very job titles indicate, the employees in this department are skilled men, who perform types of services identified with traditional trades and crafts, and who generally receive a higher rate of compensation. They have much more in common with one another than with the ordinary service employees, such as elevator operators, porters, maids, nurses' aides, laundry and kitchen workers.

19. The Employer contends that the assistant to the chief engineer should be excluded from any unit. In this department, only the chief engineer has authority to hire, fire or discipline employees, or to recommend such action. We find the assistant to the chief engineer has no supervisory functions, and he is included with the other engineer maintenance employees.

20. This stock clerk is in charge of the stock room in this department and dispenses materials to the maintenance employees. Although his duties are not clerical, he does not perform any of the skilled duties of other employees in the department. We find that his interests are allied to those of the service employees and we shall include him in the same unit.

All the parties agreed that the clerk-typist in this department be excluded from any unit.

21. Maintenance Division has not invoked the craft proviso of Section 705(2) of the Act. Thus, we are not called upon to determine whether the employees here involved constitute "a particular craft".

22. Two of the employees currently employed in this department were transferred from another department. These transferees were on a permanent basis and were considered promotions.

*Appendix A*

Maintenance Division and its predecessor, Building Maintenance Craftsmen of the Building and Construction Trades Council, A.F. of L., is an organization sponsored by, and affiliated with, Building and Construction Trades Council of New York City. Maintenance Division has many contracts with employers, other than hospitals, wherein it represents only the skilled maintenance employees, their helpers and assistants. It does not represent, or seek to represent, such service employees as elevator operators, porters, char women, etc.

Collective agreements between voluntary hospitals and unions, in the City of New York, generally have covered both service and maintenance employees. Maintenance Division has but one contract with a hospital (New York University Hospital) covering maintenance employees. Although Board decisions since the recent amendment of the Act have found service and maintenance units to be appropriate,[23] in none of those proceedings had any party sought a unit limited to maintenance employees. Prior to the amendment, if no union sought a smaller unit, we generally found a service and maintenance unit appropriate in proprietary hospitals.[24] However, in *Long Island Home Ltd.*, 21 SLRB 1, we found a maintenance unit appropriate, and we conducted a consent election for a maintenance unit in *Brunswick Home,* Case No. SE-28892. In non-hospital

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23. See, for example, *Flushing Hospital and Dispensary,* 26 SLRB 445, 446-447; *Knickerbocker Hospital,* 26 SLRB 569, 570; *Harlem Eye & Ear Hospital,* 26 SLRB 583, 584; *St. Barnabas Hospital For Chronic Diseases, et al.,* 26 SLRB 650, 653; *The New York Infirmary,* 27 SLRB No. 14.

24. See, for example, *McChesney (Adelphi Hospital),* 2 SLRB 266, 269-270, 3 SLRB 162; *Park West Foundation, Inc.,* 14 SLRB 536, 539.

cases, the Board frequently has found appropriate units limited to skilled maintenance employees.[25]

From the foregoing, it appears that there are weighty considerations in favor of, and opposed to, establishing a separate unit for the engineer-maintenance employees. On the one hand, they are a homogeneous group of skilled employees[26] having relatively higher earnings and no interchange with the service employees, as well as a history of bargaining in, and Board decisions establishing, separate units of skilled building maintenance employees in non-hospital cases. On the other hand, there is our policy against over-compartmentalization of hospitals into numerous small bargaining units,[27] and prior Board decisions (uncontested, to be sure) finding maintenance and service units appropriate in hospitals,[28] as well as some history of bargaining in the hospital industry whereby the maintenance employees have been included in the same unit as the service employees. We find that these factors are equally balanced. Under these circumstances, especially the fact that the engineer-maintenance employees performed types of services identified with traditional trades and crafts, we believe that the as yet unexpressed desires of these employees should be determinative. Accordingly, as we have done

25. See, for example, *London Terrace, Inc., et al.*, 5 SLRB 404, 406-407; *Two Park Avenue Building, Inc.*, 5 SLRB 1252, 1253-1256; *City Investing Company*, 6 SLRB 5, 7; *Paramount Broadway Corp., et al.*, 6 SLRB 42, 48-50; *Bergdorf & Goodman Company*, 6 SLRB 878, 880; *Salmon Management Company, Inc., et al.*, 10 SLRB 564, 565-567; *International Telephone Building Corporation*, 16 SLRB 674.

26. See *American Potash & Chemical Corporation*, 107 NLRB 1418, 1423-1424.

27. *St. John's Queens Hospital*, 26 SLRB 529, 532.

28. We have previously observed that a unit of service and maintenance employees is not immutable. (*Hayes Seventy-Third Corp. (Physicians Hospital)*, 26 SLRB 428, 431, and cases cited therein).

in similar situations,[29] we shall ascertain, by a self-determination election, the desires of the engineer-maintenance employees as to whether they prefer to bargain in a separate unit, or in a larger unit including the service employees. The procedure for holding such an election will be described more fully below, and our formal unit findings will await the outcome of that election.

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29. See, for example, *Buffalo General Laundries*, 2 SLRB 82, 83-84; *Sachs Quality Furniture, Inc.*, 1 SLRB 130, 134-135; *Hern Department Stores, Inc.*, 1 SLRB 318, 322; *Cadillac Motor Car Division, etc.*, 2 SLRB 317, 320; *Fox Square Laundry Co., Inc.*, 2 SLRB 632, 638; *Buffalo Baking Corporation*, 3 SLRB 646, 651; *Suburban Laundry Co.*, 4 SLRB 652, 660-661; *Tirana Realty Co., Inc.*, 5 SLRB 665, 668-669; *Bergdorf & Goodman Company*, 6 SLRB 878, 881; *Hotel Syracuse, Inc.*, 11 SLRB 181, 184-185; Board's *Report* (1937-1939), p. 149; Robert M. Benjamin, ADMINISTRATIVE ADJUDICATION IN NEW YORK STATE, Vol. V, Supplementary Report on The State Labor Relations Board (1942) pp. 149, 151.

# APPENDIX B

## Excerpts from the Hospital's Main Brief to the New York Court of Appeals

*Argument*

The Board's certification of Local 144 as exclusive bargaining representative of the Hospital's maintenance employees was invalid from the outset ..... 35

1. A unit limited to the Hospital's maintenance employees is inappropriate ..... 36

2. The Appellate Division erred when it failed to hold that the Board denied the Hospital procedural due process when it arbitrarily and capriciously processed the Maintenance Division's petition, in contravention of the Labor Board's own Rule 41 and its practice thereunder. Had the Board not processed that petition, it would not have directed a self-determination election ..... 47

3. The Appellate Division erred in holding that the Labor Board's using a multi-question ballot for the maintenance employees was not arbitrary or inherently confusing. The ballot that the Labor Board forced the maintenance employees to use was itself sufficient reason for the Appellate Division to refuse to enforce the Labor Board's bargaining order, because the ballot (a) was in English only, (b) did not give the maintenance employees the opportunity to vote with respect to representation and unit placement by making a single mark on the ballot, and (c) was so complex, complicated and confusing that it deprived the maintenance employees of a proper opportunity to express their wishes regarding unit placement and union representation ..... 51

4. The Appellate Division erred in upholding the way in which the Labor Board tallied the maintenance employees' ballots. That tally was contrary to the Labor Board's own Decision, Order and Direction of Elections and contrary to the Act. It should have tallied the ballots along with those of the service employees, inasmuch as a majority of the 47 maintenance employees voting in the election did not vote in favor of a separate unit of maintenance employees ..... 58

**Question Involved on the Hospital's Cross-Appeal**

Was the Board's certification of Local 144 as the representative of a bargaining unit limited to 55 of the Hospital's 500 service and maintenance employees invalid, *ab initio,* because:

(a) such a balkanized unit is inappropriate for collective bargaining as both the Hospital and Local 144 contended; or

(b) the Board tallied the maintenance employees' ballots contrary to its Direction of Elections; or

(c) the Board's complex, complicated and confusing ballot prevented the maintenance employees from casting an intelligent vote in an election that Local 144 won by a *single* vote; or

(d) the balkanized unit and the confusing three question ballot were the result of the Board's violating its own rule 41, over the objection of both the Hospital *and* Local 144, in order to put on the ballot a second union that the Board had found was party to an illegal "deal" with Local 144?

The Appellate Division answered each part of this question "No."

# APPENDIX C

## Excerpts from the Hospital's Answering Brief to the New York Court of Appeals

*Argument*

I—The Labor Board acted arbitrarily, unreasonably, discriminatorily, without substantial evidence and contrary to law by refusing to set aside the election it conducted for the maintenance employees, notwithstanding Local 144's conduct before and on the day of the election that interfered with the maintenance employees' free choice of a bargaining representative. The Appellate Division correctly held that Local 144's Special Edition required the Labor Board to set aside the election. Hence it failed to pass on Local 144's other unlawful conduct that also warranted vacating the election ..... 8

1. Mr. Ottley's Conduct ..... 10
2. The Anonymous Letter ..... 13
3. Local 144's "Special Edition" ..... 15
   (a) Material misrepresentations of fact ..... 21
   (b) Local 144 had special knowledge of the facts it misrepresented ..... 28
   (c) Calculated circumstances precluded the Hospital from making an effective rebuttal ..... 29
   (d) Impact on the electorate ..... 34

II—The Labor Board committed prejudicial error when it denied the Hospital's motion to reopen the record ..... 36

*Appendix C*

III—The Appellate Division had the duty to review all the Labor Board's actions in this proceeding and to set those actions aside if it found that they are not supported by substantial evidence. By its failure to set aside the Labor Board's bargaining unit determination, and to reject the Labor Board's complex, complicated and confusing ballot and unlawful method of counting the ballots, the Appellate Division mistakenly accepted the Labor Board's argument that its actions in these regards are beyond a court's review. This Court should correct the Appellate Division's error, and should set aside those actions of the Labor Board ..... 40

IV—The Appellate Division correctly held that the Labor Board acted without substantial evidence and acted contrary to law in 1971 when it ordered the Hospital to bargain with Local 144, in view of Local 144's inordinate and deliberate delay in filing its unfair labor practice charge and the change in the composition of the bargaining unit while the Union was trying to oust the courts of their jurisdiction and deprive the Hospital of its day in court, all considered in light of Local 144's one-vote majority in the election, the complex, English-only ballot, the Labor Board's questionable tally of the ballots, the questionable appropriateness of the unit, Local 144's lies about wages and benefits on the eve of the election and its invasion of the polling area during the election, and the maintenance division's untimely intervention. All this was more than enough to compel the Appellate Division to annul the Labor Board's bargaining order even if the Appellate Division had not held that the Board erred when it certified Local 144 in 1964 ..... 51

*Appendix C*

**Questions Involved on the Labor Board's and Local 144's Appeals**

1. Was the Board's certification of Local 144 as the representative of a bargaining unit limited to 55 of the Hospital's 500 service and maintenance employees invalid, *ab initio,* because:

(a) Local 144 made material misrepresentations to the employees on the eve of the election about wages and benefits Local 144 claimed it negotiated at other hospitals, to which the Hospital could not reply; or

(b) Local 144's President invaded the voting area while the employees were voting, contrary to the Board's rules; or

(c) the Board's refusing to hold a hearing on the Hospital's Objections to the Election was discriminatory and deprived the Hospital of due process of law?

The Appellate Division answered part (a) of this question "Yes" and did not answer parts (b) and (c).

2. Even assuming the Board's certification was valid when it issued in 1964, is it stale today and unenforceable because:

(a) Local 144 abandoned it;

(b) Local 144 was guilty of laches and is estopped from asserting any rights under the certification;

(c) Local 144's efforts to proceed under Section 716 of the Act constituted an election of remedies; and

(d) only a miniscule number of the persons who were members of the unit at the time of certification were employees of the Hospital at the time of the Board order herein, and even fewer are employees today?

*Appendix C*

The Appellate Division seemed to answer parts (a), (b) and (c) of this question "Yes" and did not answer part (d).

3. Notwithstanding Local 144's four and one-half year delinquency in filing its charge, is the Board's remedy of a bargaining order today, rather than a new election, an abuse of discretion and punitive rather than remedial?

The Appellate Division seemed to answer this question "Yes."

4. Did the trial examiner err when he refused to permit Hospital counsel to inspect the Labor Board's confidential file on the case, although he had access to it and during the hearing took certain documents from it, either to introduce into evidence or for purposes of his examining witnesses?

The Appellate Division did not answer this question.

5. Did the Board commit prejudicial error when it denied the Hospital motion to reopen the hearing?

The Appellate Division did not answer this question.

## APPENDIX D

### Excerpts from Transcript of Record Before the Board (pp. 211-212)

Mr. D'Ablemont: The file has not been made accessible to me. I haven't seen any of the papers in the file.

Trial Examiner: You are not going to either.

Mr. D'Ablemont: How can I determine—

Trial Examiner: You already called for some papers and they were made available to you so you are able to identify them in any instance.

Mr. D'Ablemont: I didn't know where they came from. They were handed out to employees.

Trial Examiner: I think this witness testified that despite the fact that the original ballots were destroyed that there were probably copies of the sample ballots and the ballots used at the election in the Board's file. The Board's file was sent for and those papers were extracted and made available for your use during this hearing.

Mr. D'Ablemont: Was the Board's confidential file made available to counsel for the charging party?

Trial Examiner: I don't know.

Mrs. Vladeck: I have not requested it since I don't believe we are entitled to it.

Trial Examiner: I doubt that Mr. Alfieri would have shown that—that is for Mr. Alfieri to answer.

Mr. Alfieri: No, she has not.